High Court to Rule on Right to Silence

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The Supreme Court agreed yesterday to consider a Washington robbery case in which a defendant claimed he was penalized for remaining silent when the police told him he had a constitutional right to do so.

Set for argument later this term was the case of William G. Hale, who declined to explain to arresting officers in June, 1971, where he got the $158 in his possession and then—after taking the witness stand at his trial and offering an explanation for the money — was cross-examined about why he hadn't told the police the same story.

The issue that has sharply divided judges here, federal courts across the country and members of the Supreme Court is whether, by penalizing the exercise of constitutional rights, such a prosecution tactic violates the defendant's privilege against self-incrimination and his right to defend himself.

In 1965 the high court ruled that a judge or prosecutor cannot call the jury's attention to the fact that the defendant did not take the witness stand.

That case, Griffin vs. California, was praised as one of the most significant decisions of the Warren Court and criticized as an obstruction to prosecutors. Among the critics in a 1967 opinion by members of the National Crime Commission were Lewis F. Powell Jr., now a Supreme Court justice, and Leon Jaworski, the second Watergate special prosecutor.

A divided court of appeals, reversing Hale's robbery conviction, said the Griffin principle applied equally to protect the right to silence in the police station as well as the court room.

Chief Judge David L. Bazelon, joined by Judge John Minor Wisdom of New Orleans, said there was "nothing inconsistent" about Hale remaining silent under police questioning and then offering an alibi at his trial. Therefore, they ruled, there was no basis for the line of cross-examination pursued by Assistant U.S. Attorney John R. Dugan.

Dissenting Judge Malcolm R. Wilkey said the prosecutor's questioning was proper and even if it wasn't, it didn't affect the verdict because the presiding judge, Gerhard A. Gesell, promptly instructed the jury to disregard it.

In taking the case to the Supreme Court, the Justice Department said the questioning was "crucial to the mission of a trial—accurate ascertainment of the truth" through cross-examination.

Solicitor General Robert H. Bork said it may be impermissible to offer evidence of the accused's silence as evidence of guilt, but "where he testifies, a jury should be permitted to assess the credibility of his story by learning that he is telling it to the authorities for the first time in court."

Supporters of the Griffin decision contend that the government's argument ignores the impact on the jury of such cross-examination and the danger that the jury will equate silence with guilt.

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